REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE No. 538 OF 2008 FORMERLY ELC NO. 564 OF 2008

AINAB HASHI GELI. ……..……..…… PLAINTIFF

VERSUS

CHRISTOPHER AYAGAH MOMANYI. ….....……..… 1ST DEFENDANT
ALICE MOKEIRA AYAGAH. ……..…… 2ND DEFENDANT
PETER GATHUNGU GIKONYO. ……..…… 3RD DEFENDANT

R U L I N G

Before me is a Chamber Summons under certificate of urgency filed by the plaintiff dated 7th July, 2009. It was brought under Section 3A and 63 (e) of the Civil Procedure Act (Cap 21) and Order XXX1X rule 2, 2A (2) and Order XXX1 rule 28 (1) of the Civil Procedure Rules. The application has seven prayers two of which have been spent as follows:-

1. (Spent)

2. (spent)

3. That the defendants herein Mr. Christopher Ayagah Momanyi, Alice Mokeira Ayagah and Peter Gathungu Gikonyo be committed to civil jail for such period as this honourable court may deem just and expedite in the circumstances.

4. That the court do assess and the defendants herein Mr. Christopher Ayagah Momanyi, Alice Mokeira Ayagah and Peter Gathungu Gikonyo be ordered to pay damages for the loss suffered by the plaintiff and her licencees.

5. That the defendants' properties be sequestrated and sold in recovery of damages as may be ordered by the court.

6. That this honourable court be pleased to make an order as to all future rent payments due.

7. That the costs of this application be provided for.

The application has grounds on the face of the Chamber Summons. It was filed with a supporting affidavit sworn by the plaintiff on 7th July, 2009.

The grounds are that Justice Visram on 1st December, 2008 issued an interim temporary injunction restraining the defendants from terminating, evicting, threatening to evict or otherwise interfering with the plaintiff and her tenants quiet possession and enjoyment of the property L.R. No. 36/1/11 Eastleigh

Estate. That the said orders had been extended severally by consent of the advocates for the parties, the last of which extension was on 18th June, 2009 granted before Justice Nambuye. That the defendants in flagrant disregard of the said orders had evicted the plaintiff and her licencees from the said premises. That as a consequence the authority and dignity of this court had been and continues to be exposed to ridicule and disrepute. That the defendants have acted in willful and blatant disobedience of this court's orders. That it was in the interests of justice to uphold the dignity of this court by granting the orders sought.

In the supporting affidavit it is deponed, inter alia, that the order dated 1st December, 2008 was served upon the 1st and 2nd defendants. That the 3rd defendant applied to be enjoyed as a defendant and his application was allowed on 12th March 2009. That by consent the interim order was extended all along. That notwithstanding the said extension, the defendants on 2nd July, 2009 proceeded to the suit premises and removed all the doors to the various units. That the removal of the doors was conducted at the initiative of the defendants pursuant to irregular breaking orders obtained at Milimani Chief Magistrate's Court Miscellaneous application No. 668 of 2009. That the advocate for the plaintiff wrote a letter of complaint to the advocates and agents of the defendants. That in flagrant disregard of the orders herein and the plaintiff's advocate's advice, the defendants proceeded to evict the licencees on 3rd July 2009 through an auctioneer called Wanjohi. That there was confusion as to the beneficiary for the rent in this matter in that the 1st and 2nd defendants have laid a claim to the rent while the 3rd defendant has suddenly moved to Milimani Court for the same rent. That the auctioneer did not proclaim the property in the claim for the rent.

The plaintiff's advocate Koskei Monda & Co. filed written submissions on 16th June 2010. It was contended that though the interim injunctive orders issued by Justice Visram were extended all along, and though the 3rd defendant was enjoined in the suit by consent, subsequent to that joinder the defendants on 2nd July, 2009 through hired people removed doors of the suit premises. That on 3rd July 2009, in spite of the fact that the plaintiff's advocates had written a protest letter notifying the defendants of the illegality, the defendants used breaking orders obtained in an application by an auctioneer appointed by the 3rd defendant to evict the tenants from the building. Counsel contended that there was no proclamation for rent or notice of eviction. Secondly, there was confusion as to who was to receive rent. It was contended that in fact in an application filed by the 3rd defendant for breaking orders, the 3rd defendant swore in an affidavit dated 12th January 2009 stating, inter alia, as follows: -

"In order to ensure that upon conclusion of this matter, no party begins to sue in recovery of rent from the other, I am advised by my advocates on record (Miggos Ogamba & Co Advocates) pending the hearing and determination of this suit all the rent from the months of November, 2008, December, 2008 and January 2009 and all subsequent periods be deposited in court for preservation."

It was contended that in the replying affidavit sworn on 1st August, 2009 for the 1st and 2nd defendants the averments of the plaintiff in this application have not been controverted. It was also contended that in the affidavit of the 3rd defendant sworn on 20th July, 2009 he deponed that he was never served with the order and that he was the owner of the suit premises and as such was entitled to use any lawful means to obtain rent there from or evict any person not paying rent. It was contended that the 3rd defendants replying affidavit was full of falsehoods and material non disclosure of information. It was particularly contended that Munga Kibanga and Co. Advocates had capacity to act for the 3rd defendant contrary to what he deponed in the said affidavit. It was contended that the 3rd defendant acknowledged evicting the plaintiff and tenants without eviction orders. It was contended that the 3rd defendant had knowledge of the restraining orders and therefore, had no basis of evicting the plaintiff and her tenants.

On the issue of the requirement for personal service, counsel cited the case of **Koinange Investments and Development Limited versus Nairobi City Council and 3 others – CA 535 of 2006** where Visram JA observed that it was incumbent upon every person who has knowledge of the court order to obey it whether or not they have been personally served with it. That the first duty is to obey it,

and then to seek clarification and then take steps to challenge it. It was contended that this being an application for a mandatory injunction and punishment of defendants that personal service was not mandatory.

On the issue of eviction, it was contended that the court had held recently that even where there is no order barring a party from evicting, one was required to obtain an eviction order before carrying out eviction. Reliance was placed on **Emmanuel Waweru Lima Mathaai Versus K N F C K Limited & 4 others – Nakuru HCCC 634 of 2008.**

On appropriate punishment and redress, counsel contended that the court had wide powers which included the issuance of mandatory injunctions. Reliance was placed on **Belle Maison Limited versus Yaya Towers Ltd HCCC No. 2225 of 1992 Nairobi** where Bosire J, as he then was, stated that, even where no specific provision under the Civil Act and Rules empowering a court to grant interlocutory orders at interlocutory stage, courts in this country had often granted the remedy. Counsel emphasized that under Order XXXIX rule 2, 2A (2) of the Civil Procedure Rules, the court had powers to punish persons who had disobeyed its orders. It was therefore, important for the court to flex its muscles to uphold the rule of law and grant the prayers sought. It was emphasized that the plaintiff had no other way of enforcing her rights. The defendants had not shown any remorsefulness in the matter.

The application is opposed. The 1st & 2nd defendants filed an affidavit sworn on 1st August, 2009 by Christopher Ayagah Momanyi – the 1st defendant. The said affidavit is said to have been authorized on behalf of the 2nd defendant.

It was deponed in the said affidavit, inter alia, that the deponent did not remove any doors as alleged nor evicted or instructed anyone to evict the tenants. It was deponed that there was no confusion over rent payment as alleged and that in fact the plaintiff had been inconsistent in her rent payment and should have deposited the rent in court immediately she experienced any difficulties in deciding where to pay. That the plaintiff got ex parte orders and refused to pay rent or paid as and when she felt like. Presently she had an outstanding rent balance of Ksh.1,400,000/-. That what the plaintiff swore in her affidavit was false and malicious and too general. That the deponent had not disobeyed any court orders.

Counsel for the 1st and 2nd defendants filed written submissions on 21st July, 2010. It was contended in the said submissions that the affidavit sworn by the 1st defendant on behalf of the 2nd defendant was not invalid. Therefore, it cannot be true that 2nd defendant did not oppose to the application. Therefore, the 1st and 2nd defendants have denied the allegations contained in the application all together.

It was contended that the 1st and 2nd defendants did not disobey any court orders and no evidence had been exhibited to suggest so. The eviction was carried out as a result of breaking in orders obtained by the 3rd defendant without knowledge of the 1st and 2nd defendants. Therefore, the 1st and 2nd defendants cannot be said to have contravened any court orders. Consequently, the prayers against the 1st and 2nd defendants should be dismissed with costs.

The 3rd defendant filed a replying affidavit sworn by himself on 20th July, 2009. It was deponed, inter alia, that he had lawfully purchased the premises on 25th November, 2008 from the 1st and 2nd defendants. That it was the 1st and 2nd defendant who indicated to him that they were considering filing an application to enjoin the 3rd defendant as a party in the suit which they did. That he was never served with the order marked "HHGI" – that is the temporary injunctive orders. That the extension of interim orders on the 1st December, 2008 did not amount to an amendment to include him in the said order. That on 18th June, 2009 his advocates were not in court to consent to any extension of the interim orders. That in the absence of any specific order barring him from the use or enjoyment of his lawful property, he was legally entitled to enjoy his rights and to use any lawful means to obtain rent there from and evict any person not paying rent. That the allegations of contempt were meant to enable plaintiff remain in the property and deprive the 2nd defendant of his economic benefit.

The 3rd defendant counsel, Munga Kibanga, filed brief written submissions on 14th July, 2010. It was contended that the orders sought by the plaintiff could not be granted because the plaintiff did not satisfy the requirements in law for seeking an order of mandatory injunction. It was also argued that the 3rd defendant was the registered owner of the property and it would against of justice for the court to grant an order against the 3rd defendant to a party who did not have contractual relationship with him. It was emphasized that the 3rd defendant could not be denied the exercise of his proprietary rights over the premises.

At the hearing Mr. Monda for the plaintiff made verbal submissions in support of the application. Mr. Mutisya for the 1st and 2nd defendants made submissions in opposition to the application. Mr. Kibanga for the 3rd defendant also made submissions in opposition to the application.

This is an application that seeks multiple orders. It seeks committal of the three defendants to civil jail. It seeks that the court assesses damages and payments of damages suffered by the plaintiff and the licencees. It also seeks that the defendant's property be attached and sold in recovery of the damages as ordered by the court. It also seeks orders for payment of rent.

In my view, the first issue is whether the 2nd defendant opposed the application. The affidavit sworn by the 1st defendant in response to the application was said to be sworn also on behalf of the 2nd defendant. However, the contents therein are in the 1st person singular. They therefore, relate to the deponent of that affidavit. An affidavit is a statement of facts or evidence. It may be used to oppose another statement of facts or evidence. The contents of the replying affidavit show that the 2nd defendant did not oppose the facts in the affidavit of the plaintiff. However, the fact that a replying affidavit has not been filed by a party does not mean that that party agrees to the contents of the application. Points of law can be raised. The 2nd defendant having raised points of opposition to the application in the submissions filed by her advocate, she cannot be said not to have opposed the application. Therefore, I find no basis for the argument that the 2nd defendant has not opposed the application.

The second issue is whether the 1st and 2nd defendants breached any orders of the court. The evidence placed on record and even admitted by the plaintiff shows that the 1st and 2nd defendants did not do any act that would show that they disobeyed the court restraining order. They are defendants in this matter, but it must be shown that they have done an act of disobedience in order for this court to have jurisdiction to deal with the matter of their conduct. All the documents filed show that they were merely defendants. There is indeed an interlocutory injunction against them. However, they have not done anything to suggest that they disobeyed the same. In my view, therefore, they cannot be liable with regard to the complaints of the plaintiff in this application.

It is quite clear from the replying affidavit of the 3rd defendant that he was the one who instructed auctioneers to evict the plaintiff and her licencees. Therefore, this application as regards the 1st and 2nd defendants has to fail.

This application will, therefore, be considered on the merits only with the regard to the 3rd defendant. It is clear to me that though the 3rd defendant was joined as party late in the proceedings, he knew of the interim orders issued by the court. Obviously, he was joined as a party because he purported to have bought the premises in November, 2008 from the 1st and 2nd defendants. To show that somebody is in contempt of court it has to be demonstrate that he or she knew of the orders granted by the court, and went ahead to willfully disobey them. The requirements under Order 39 of the Civil Procedure Rules, do not include a requirement that a written notice should be served on the person to be cited for contempt. Perhaps this is because such persons are parties to the suit and are presumed to know of the court orders by virtue of being parties.

The 3rd defendant claims that the interim orders did not apply to him. In my view, that cannot be true. The orders issued on 1st December, 2008 were against the defendants, their servants or

employees. The 3rd defendant was by an order issued on 12th March, 2009 granted leave to be joined as a 3rd defendant. In that same order, interim orders were extended. Those interim orders in my view, also affected him as a party in these proceedings because the subject matter was the same, and he had become a party and the issues were the same. He cannot, therefore, claim to be a stranger to those interim orders.

The 3rd defendant by an act of bad faith purported to file a Miscellaneous Application before the Magistrate's Court which affects the same assets, and rent arrears which are subject to litigation herein and without informing any of the parties herein went ahead and to do some acts which basically blatantly contravened the existing court order. This court cannot be impotent where its orders have being flouted with impunity.

The court will have to give reliefs in terms of prayer 3 of the Chamber Summons as against the 3rd defendant. He knew or ought to have known what this court had decided in this case, in which he had become a party. In my view, he deliberately went and made an application through the separate case filed by his agent the auctioneer in the Chief Magistrate's Court. That was an act of bad faith to circumvent this case. I am fully in agreement with what was stated by Visram JA, in **Koinange Investment and Development Limited Versus Nairobi City Council and three others – CA No. 535** of 2006 where the learned Judge of Appeal stated: -

"It is incumbent upon every person who has knowledge of an order of the court to obey it, whether they have been personally and formally served with the same or not. The first duty is to obey it, and then to seek clarification, or take steps to challenge it."

In my view, the 3rd defendant having been joined as a defendant in this suit where restraining orders were granted by the court, and where he claims to have acquired propitiatory interests in the subject property, knew and was bound to abide by the restraining orders attached to the subject property unless clarification was sought from court in this particular cause. The 3rd defendant not having sought by him that clarification from this court acted in bad faith in going behind the back of the other parties and obtaining the eviction orders in another cause. That in my view, amounts to contempt of the existing orders of this court and has to be punished accordingly.

It has been argued by the 3rd defendant that in an application for a mandatory injunction or punishment for contempt of court, personal service is required (presumably even when he is aware as I have found above). Again, I rely on the observation of Visram JA in the same above case, wherein the learned Judge of Appeal stated as follows: -

"To equate this situation with the requirement in contempt of court application where it is mandatory to effect personal service of the court order is completely misplaced. There is no such requirement of personal service in situation of ordinary day to day business. "Knowledge" of the existence of the court order is sufficient. No person who is affected by the court order and who knows of its existence can do exactly the opposite simply because he was not personally served."

There is no denying that the 3rd defendant knew about the restraining orders of the court. There is no doubt that he also knew that the restraining orders were issued relating to the subject property which he claims to have acquired from the other two defendants. There is no argument that the said order did attach on those assets. Therefore, prima facie he took those assets if he indeed acquired proprietary interests, with the burden of those restraining orders. Indeed he chose to become a defendant in this case, most probably because of his proprietary interests. Therefore, he cannot claim that because he was not personally served with the orders, then he can disobey them with impunity and get away with it.

The plaintiff has asked the court to assess damages and order payment of damages for loss suffered by plaintiff and licencees. She has also asked that the defendants' property be attached and sold in recovery of damages. These two prayers are not grantable in the form in which they were worded. The court has not been given any parameters on how to assess those damages. The court cannot invent damages to be awarded to a party in proceedings. Attempting to do so, will put the court in the position of

a litigant which a court cannot do. The court can only grant something that a party has prayed for and has put a specific case and particulars for the court to determine if it is grantable and to what extent. A mere blanket prayer without evidence or proposals cannot be acted upon by the court.

On the properties to be attached and sold, the plaintiff or applicant has not indicated what properties the defendants have which could be so attached and sold. Again, the court cannot invent properties belonging to the defendants. It was for the plaintiff to bring and identify to court the properties which belong to the defendants and which should be attached and the reasons, for the court to judicially adjudicate on the same. In the absence of that, the court is being called upon to act in vain. A court of law cannot act in vain and I cannot do so in the present case. There are also no facts to justify the grant of prayer 6.

In the result, this application will be allowed in part. I grant prayer 3 with respect to the 3rd defendant. He is hereby found guilty of contempt of court and is committed to civil jail for a period of 60 (Sixty) days. The applicant/plaintiff is granted costs of this application against the 3rd defendant.

I make no orders as to costs in regard to the 1st and 2nd defendants.

Dated and delivered at Nairobi this 21st day of September 2011.

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GEORGE DULU

In the presence of
Mr. Okemwa holding brief for Mr. Monda for the plaintiff
Non appearance for the 1st, 2nd, and 3rd defendants
C Muendo – court clerk